In the United States Circuit Court of Appeals for the Ninth Circuit

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ERI THOMPSON and
J. M. CUMMINGS,
Appellants,
v.
J. L. REED,
Appellee.

No. 2162.

Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This is an appeal by the defendants from a decree for the plaintiff in a creditor's suit to subject to his execution on a judgment at law sundry property transferred by the appellant Thompson to the appellant Cummings prior to the recovery of that judgment. The amended complaint (printed Record, pp. 1-7) alleged (I) the recovery by the original plaintiff in this suit, Thomas H. Meredith, on April 25, 1910, of a judgment at law against the appellant Eri Thompson for $1,631.25, still unsatisfied; (II) the issuance of an execution thereon July 1, 1910, and its return unsatisfied on August 26th, and the issuance of an alias execution on September 2nd and its return unsatisfied, "in

due course thereafter;" (III) that about May 22, 1910, a deed from Thompson to the appellant J. M. Cummings was filed for record in the office of the recorder of the Cook Inlet precinct at Susitna, Alaska, purporting to convey the following property lying in said precinct, to-wit, (1) a placer mining claim known as the "Battle Ax," on Thunder Creek, (2) an undivided half interest in a saloon in the town of Susitna, Alaska, known as Thompson & Price's saloon, "including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated," and (3) "that certain log house adjacent to John Jones' bath-house and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna, together with all fixtures and chattels therein contained owned by said first party, and also that certain log cabin situated in the rear of said log house, with all chattels therein contained;" (IV) "that said purported deed was not made in good faith nor for any valid consideration, but was a device for and was made and received with the intention of placing the property of said Thompson beyond the reach of creditors, and particularly of this plaintiff, and for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said judgment, and * * * * in consummation of a combination and conspiracy between said Thompson and said Cummings to defraud plaintiff and other creditors," and was made many months prior to the recovery of the plaintiff's judgment at law, but long after the action therefor was begun, but the deed was not filed for record till nearly

a month after the judgment was rendered nor until a transcript thereof had been sent for record to the recorder at Susitna, to make it a lien upon Thompson's real property in said precinct, and the deed was filed for record in said office about three hours before the filing of the transcript; (V) that Cummings has never taken possession of any of the property conveyed, real or personal, but it has remained in the custody and control of Thompson, who has at all times exercised the rights of ownership and is now in complete possession and control of all thereof; (VI) that the judgment referred to in paragraph I was recovered in cause No. 233 in the same court, against Dave Wallace and said Thompson, copartners as Wallace & Thompson, jointly and severally, and that Wallace left Alaska about October 1907 and has not since returned, and departed for the purpose of hindering, delaying, defrauding and defeating the plaintiff in the collection of his claim embraced in said judgment; (VII) that the personal property reconveyed by Cummings to Thompson as set forth in paragraph III of Cummings's answer was mortgaged by Thompson to one W. Murphy on July 14, 1910, the mortgage being recorded at Susitna on the 15th, and that said mortgage and deed were given and made for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his judgment, that said mortgage and deed transferred all of Thompson's property, real and personal, in Alaska or elsewhere known to plaintiff, and out of which he could satisfy his judgment, and that Thompson is insolvent; and (VIII) that neither Wallace nor

Thompson has any property other than that transferred to Cummings and that mortgaged to Murphy out of which the plaintiff could satisfy his judgment, and (IX) he has no plain, speedy and adequate remedy at law.

The prayer of the amended complaint is for a decree declaring the deed from Thompson to Cummings to have been made without consideration and in fraud of Thompson's creditors and that it be vacated, set aside and held for naught, that the property therein described be decreed to be still Thompson's and subject to the lien of said judgment against him, for an injunction meanwhile against any transfer thereof, and for general relief. There is no prayer for costs.

The answer of Thompson (Record, pp. 16-20) denies that he was the owner of or had any interest in the property described in paragraph III of the amended complaint at any time since October 25, 1909, except an undivided half interest in the stock, liquors and licenses in the Thompson & Price saloon at Susitna, which interest was from Feby. 25, 1910, until May 19, 1911, his property and in his possession; (II) answering paragraph IV of the amended complaint, denies that the conveyance referred to was not made in good faith and for a valuable consideration, or was a device for or made and received with the intention of placing his property beyond reach of his creditors, for the purpose of hindering, delaying, etc., or was made or accepted in consummation of a conspiracy between the defendants to defraud the plaintiff, or in fraud of any person; (III) answering paragraph V of the amended

complaint, denies that Cummings has never taken possession of any of said property conveyed to him, and avers that Cummings has been since October 25, 1909, and he is informed and believes that he is now, the owner of all thereof except the undivided half interest in the stock and licenses of Thompson & Price's saloon; (IV) denies that his mortgage to Murphy, referred to in paragraph VII of the amended complaint, was made for the purpose of hindering, delaying or defrauding the plaintiff in the collection of his judgment, or in fraud of any person, and alleges that said mortgage has been fully paid and satisfied; further answering, (V) avers that he sold all of the property mentioned in the amended complaint to Cummings, about October 25, 1909, "for the sum of fifteen hundred dollars lawful money of the United States of America, which sum was fully paid," and that about Feby. 15, 1910, he repurchased from Cummings the undivided half interest in the saloon stock and business included in the previous sale, and immediately went into possession thereof and continued the owner and in possession until May 19, 1911; and (VI) further avers (1) that he was never indebted to Meredith (the original plaintiff in this cause) in any sum, and at no time was in partnership with Dave Wallace in the mining business, (2) that the judgment at law (on which this cause is based) was secured by fraud, perjury and mistake; (3) that at the time he made the sale to Cummings complained of, and for long prior thereto, he had been at Valdez, Alaska, endeavoring to secure a trial of the action of Meredith v. Thompson and Wal-

lace, that the plaintiff therein was not ready for trial, and that this defendant was informed by his attorney that no just cause of action existed against him, and (4) that he sold the property mentioned in the amended complaint to Cummings for full value and at a time when this defendant did not owe any debts in the Territory of Alaska, except on the saloon stock—which Cummings assumed.

Issue was joined by reply (Record, pp. 22-3) upon the new matter set up in paragraph V of this answer; and the new matter in paragraph VI was stricken out (Record, pp. 24-5) on demurrer thereto, except the fourth subdivision thereof, which was allowed to stand, whereupon the plaintiff put in a further reply joining issue thereon (Record, p. 25).

The answer of Cummings to the amended complaint (Record, pp. 11-15) alleges (I) that about October 25, 1909, he purchased from Thompson the properties mentioned and Thompson then and there executed a deed to him therefor, and delivered possession to him, and ever since that time he (Cummings) has been and now is the lawful owner and in lawful possession of all said property, except as below stated, and that on May 22, 1910, he recorded said deed at Susitna, that he denies that said property or any interest therein has been Thompson's at any time since the date of said deed, and that he has had any possession thereof since then, except as below stated, and avers that about Feby. 15, 1910, he sold and delivered to Thompson all his interest in the saloon stock and licenses and rented to him the saloon building and other buildings at Susitna

for $25 per month, and Thompson has since then had no right in said buildings other than as his (Cummings's) tenant; (II) answering the fourth paragraph, denies the bad faith, lack of consideration, fraud and conspiracy there alleged; (III) denies the whole of the fifth paragraph and (IV) denies knowledge, etc., as to the truth of the matters in the seventh paragraph; and alleges affirmatively (I) his purchase of all said property from Thompson on October 25, 1909, for $1,500 "lawful money of the United States of America, which sum was fully paid," and his resale and redelivery to Thompson, about Feby. 25, 1910, of the half interest in the saloon stock, licenses and business, and (II) that he had no knowledge or information that Thompson was on October 25, 1909, indebted to anyone, or that he sold him (Cummings) said property or any of it for the purpose of hindering, delaying or defrauding the plaintiff or anyone.

Issue was joined by reply (Record, pp. 20-21) upon the new matter in this answer.

The cause was tried at Seward, Alaska, on Feby. 17, 1912, to the extent of putting in the evidence on both sides (Record, pp. 31-115), and was then continued to the court's impending session at Valdez for the submission of written arguments and the rendering of the court's decision. On the day before the trial in Seward, the defendant Cummings moved for a continuance upon his attorney's affidavit (Record, pp. 27-30) setting forth, in substance, that the defendant Thompson was an important witness in behalf of Cummings, and that he was expected to be present but owing to having met

with an accident he was detained at Susitna, a place 175 miles distant from Seward and with which the only communication was by monthly mail service, and setting forth the substance of the testimony which Thompson would give if present. The motion for continuance was denied by the court (Record, p. 41), under section 169 of the Alaska code of civil procedure, upon the plaintiff's admitting that the evidence of Thompson, if present, would be given as set out in the affidavit; and on the basis of this admission the affidavit was read in evidence at the opening of the defense (Record, pp. 40, 27-30), as equivalent to Thompson's testimony, under the practice of the Alaska courts. This evidence, as well as the rest of that produced at the trial, will be summarized in the course of our argument, so far as pertinent to the points under discussion.

While the cause stood continued to the Valdez term for the submission of the written arguments, the court granted a motion of the defendants, based on a showing that the judgment at law on which this suit is based had been assigned by the original plaintiff, Meredith, to J. L. Reed, one of his attorneys in this suit, to substitute Mr. Reed as the plaintiff herein; and the judgment, when rendered, was entered in favor of J. L. Reed as the substituted plaintiff, and all the subsequent papers bear the amended title. (Record, pp. 115-18.)

The court below, on April 27, 1912, filed an opinion (Record, pp. 119-39) embodying its decision in favor of the plaintiff as to certain of the property embraced in the deed of conveyance from Thompson to Cummings, namely, those items of the property which the

court regarded as real estate, and denying the plaintiff equitable relief as to the rest of the property, which the court classed as personalty. Upon this "decision," findings of fact and conclusions of law prepared by the plaintiff were signed by the court on May 4th (Record, pp. 139-46) and on the same day judgment was entered in favor of the plaintiff (Record, pp. 146-9), adjudging that the deed from Thompson to Cummings "was made with intent to hinder, delay and defraud the creditors of the said Eri Thompson and is void as against the plaintiff's judgment" (at law) * * * * "and as against plaintiff in this action," that the plaintiff has a valid lien under said judgment and in this action upon the real property described in said deed, to-wit, the mining claim and the half interest in the saloon building and the parcel of land whereon it is situated, such lien dating from May 22, 1910, and that the record of the deed is cancelled in so far as it conflicts with the plaintiff's judgment and lien, and that the plaintiff may proceed with execution accordingly, and also rendering judgment against both defendants for the costs of this suit. From this judgment the defendants have joined in appealing, by their separate attorneys, to this court (Record, pp. 150-62).

The following is the text (Record, pp. 150-53), omitting formal parts, of the appellants'

Assignment of Errors.

1.

That the above-named District Court erred in over-

ruling the demurrer of said defendant Thompson to the amended complaint of the plaintiff in said cause.

2.

That said District Court erred in overruling the demurrer of said defendant J. M. Cummings to the amended complaint of the plaintiff in said cause.

3.

That said District Court erred in holding, on the trial of said cause and as set forth in its opinion and decision therein filed on April 27, 1912, in substance and effect that the burden of the evidence as to the *bona fides* of the sale in question in said cause was shifted from the plaintiff to the defendants.

4.

That said District Court erred in holding, in its said opinion and decision in said cause, that the original plaintiff therein had brought himself into privity with the real property in question in said cause, so as to have a standing in equity to maintain said action to set aside the transfer thereof for fraud against creditors.

5.

That said District Court erred in holding, in its opinion and decision in said cause, that the original plaintiff therein, before instituting said cause, had exhausted his remedy at law against said defendant Thompson for

the enforcement of said plaintiff's judgment at law against him.

6.

That said District Court erred in holding, in its said opinion and decision in said cause, that the mining claim in question was real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

7.

That said District Court erred in holding, in its said opinion and decision in said cause, that the saloon building and lot in question were real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

8.

That said District Court erred in finding, in its finding of fact No. VI set forth in its findings of fact and conclusions of law filed in said cause on the 4th day of May, 1912, in substance and effect that the conveyance therein mentioned was made with intent to defraud the creditors of said defendant Thompson.

9.

That said District Court erred in making its socalled

"conclusion of law" No. 1 set forth in its said findings of fact and conclusions of law.

10.

That said District Court erred in making its so-called "conclusion of law" No. 2 set forth in its said findings of fact and conclusions of law.

11.

That said District Court erred in making its conclusion of law No. 3 set forth in its said findings of fact and conclusions of law.

12.

That said District Court erred in making its socalled "conclusion of law" No. 4 set forth in its said findings of fact and conclusions of law.

13.

That said District Court erred in making its conclusion of law No. 5 set forth in its said findings of fact and conclusions of law.

14.

That said District Court erred in finding for the plaintiff in said cause on the issue of fraud.

15.

That said District Court erred in finding for the plaintiff in said cause on the issue of lack of consideration.

16.

That said District Court erred in rendering said judgment hereby appealed from, in favor of said plaintiff and against said defendants in said cause.

POINTS.

1.

The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief.

2.

The court below erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration in the transaction between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent *in toto.*

3.

The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence.

4.

Even if certain of the property conveyed was real estate, the plaintiff had not brought himself into privity therewith, and hence cannot maintain this suit.

5.

The court's first "conclusion of law" is a mere finding of fact and not of law, and is unwarranted by anything in the pleadings or proofs.

6.

The court's second "conclusion of law" is also a mere finding of fact, and foreign to the issue.

7.

The court's third "conclusion of law" is not sustained by anything in the facts found.

8.

The court's fourth "conclusion of law" is a mere finding of fact, and as such is not sustained by anything in the pleadings or proofs.

9.

The court's fifth conclusion of law is not sustained by the facts found, and the court erred in entering judgment accordingly.

Argument.

1.

The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief.

This point is urged in support of the first and sec-

ond assignments of error—the trial court's overruling the separate demurrers of these appellants to the amended complaint—and the fifth assignment of error—the court's holding that the plaintiff had exhausted his remedy at law prior to instituting this suit.

The law undoubtedly is,—and the trial judge so held as regards personalty,—that so long as a judgment debtor has property open to execution his judgment creditor cannot go into equity to satisfy his judgment out of assets which, as between the debtor and third parties, belong to the latter.

Now, the amended complaint shows (par. VII—Record, p. 5) that the Susitna saloon business, its stock of liquors and licenses,—or rather the half-interest therein that was included in Thompson's conveyance to Cummings of October 1909,—were reconveyed by Cummings to Thompson in February 1910, prior to the plaintiff's judgment at law, and stood in Thompson's name when this equity suit was begun (October 1910), but had been mortgaged by him in the interval to one Murphy for $1,100. This shows that, notwithstanding the marshal's formal returns of *nulla bona* on the original and alias executions, there *were* seizable chattels in Thompson's hands which were not seized in execution. It is true that an officer's return on a writ may not be collaterally questioned; but one seeking a remedy which depends on a fact so certified may admit away that fact in his pleading, and this the plaintiff did by the showing made in paragraph VII of his amended complaint.

The appellee may point to the provision of section

317 of the Alaska civil code, that "personal property mortgaged may be taken on attachment or execution issued at the action of a creditor of the mortgagor, but before the property is taken the officer must pay to the mortgagee * * * * the amount of the mortgage debt," etc.; and he may contend that he was not bound to exhaust his remedy against this mortgaged personalty when recourse to it was coupled with such burdensome conditions, before suing in equity to reach other property. But, first, this statute plainly gives recourse at law to incumbered chattels, and the fact that such recourse is conditioned upon the execution creditor's first discharging the mortgage debt does not make it the less a "remedy at law;" secondly, the *title* to mortgaged property rests in the mortgagor, the mortgagee having neither legal nor equitable estate therein, but a mere lien thereon; and, lastly, the appellee alleged, in the same paragraph of his complaint in which he acknowledged that Thompson had become repossessed of this personalty, that the mortgage of it to Murphy was made in fraud of his judgment. This allegation, to be sure, was made against the validity of Murphy's mortgage lien, and Murphy is a stranger to this suit, could not contest this averment, and is not bound by it; but as between the appellee and Cummings this assertion may be taken as true—Cummings has the benefit of it. Therefore, according to the appellee, the saloon chattels were not burdened with a mortgage valid as against him, and he was not bound to tender the mortgage debt, but could levy in defiance of the apparent lien.

See Safe-Deposit & Trust Co. v. City of Anniston, 96 Fed. 661.

Lee v. Harback, 2 Ohio Dec. (Reprint) 361.

2.

The court below erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration in the transaction between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent in toto.

This point is urged in support of the third assignment of error—the trial judge's holding that by reason of the non-transfer of possession of the personalty pursuant to the conveyance, the burden of proof of *bona fides* of the conveyance as respects *all* the property embraced therein shifted, and devolved upon the defendants.

The trial judge in his opinion (Record, pp. 127-8) cited section 1043 of the Alaska code of civil procedure, —"Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be a fraud against the creditors of the vendor or assignor * * * during the time such property remains in the possession of said vendor or assignor,"—and drew therefrom the inference (p. 129) that "While * * the fraud presumed from want of change in possession is confined to personal property, yet in this case, where both real and personal property were trans-

ferred by one instrument, which property constituted the entire estate of the debtor, and there was no actual change of possession of any of the property until long subsequent, this taken in connection with the various circumstances above pointed out *is sufficient to shift the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants.*"

Herein lies a fundamental error of the court below —or rather two errors, one of fact and one of law; errors which, if we shall satisfy this court that they are such, must deprive the trial court's weighing of the testimony of the presumption of correctness which would otherwise attend it when under appellate review.

First, the trial judge erred in point of fact, in concluding that there was no "immediate delivery and actual and continued change of possession" of the personal property, accompanying the instrument of transfer.

In whom did the actual, physical possession of the personal property rest, immediately prior to the execution of the conveyance? Not in Thompson, for he was in Valdez, nearly four hundred miles from Susitna; but in Price, his partner in the ownership of the Susitna saloon stock, licenses and business. The possession of Price, as co-owner and copartner,—agent, therefore, of the other co-owner and copartner,—was the possession of Thompson so long as the latter remained his copartner, but no longer; on the instant that Thompson, by conveying to Cummings, ceased to be Price's co-owner and copartner, Price's actual possession became referable to his new co-owner, Cummings, *quoad* Cum-

mings's undivided share. The personal property no longer "remained" in Thompson's possession—a merely constructive possession theretofore; it shifted immediately, automatically, to Cummings upon the transfer of the title.

These principles are elementary, and characterize the facts beyond dispute. Neither Thompson nor his vendee Cummings would have any right to take the actual possession away from the co-owner Price, with a view to its delivery in consummation of the sale; but the law shifted the constructive possession with the title.

Secondly, the trial judge erred in clothing the *constructive* fraud stamped by the statute upon a transfer of title to personalty, without concomitant transfer of possession, with the power of tainting, as presumptively fraudulent *in fact,* the transfer by the same instrument of title to realty—which need not be accompanied by transfer of possession.

For this is to lose sight of the inherent distinction between constructive and actual fraud. The former is a character stamped by the policy of the law upon specified acts not done in a prescribed manner and form, no matter how innocent in intent and essence these acts may be; the latter necessarily involves moral obliquity—cannot exist in its absence. Constructive fraud is the creature of positive law—*malum prohibitum;* fraud in fact has its root in ethics. No constructive fraud is grafted by statute upon a transfer of title to realty without livery of seizin; and to hold that because the same instrument also transfers the title to personalty in a manner—i. e., unaccompanied by

transfer of its possession—declared by a statute to be (irrespective of actual intent or motive) a fraud against the vendor's creditors, therefore the transfer of the realty is *prima facie* fraudulent, is to impute moral delinquency where its non-existence is entirely consistent with the transaction, and to ignore other statutory provisions (sections 98, 130, Alaska civil code) which deal adequately with the transfer of realty, both as to formal requirements and as to the motive involved.

This misconstruction of the statute deprives the trial judge's conclusions from the testimony, as we have said, of the weight which such conclusions ordinarily carry on an appeal. We do not lose sight of the unusual rule of appellate courts that they will not disturb a trial judge's conclusions of fact if there is testimony to sustain them, even though the appellate judges may regard the preponderance of the testimony as leaning against the facts found. But this trial judge was weighing the testimony to determine whether it exculpated the appellants from guilt (intent fraudulent in fact) with which he erroneously held them *prima facie* chargeable; not to determine (as he ought to have done) whether the preponderance of testimony fastened upon them that guilt, of which they stood *prima facie* free. He has nowhere found that the evidence affirmatively fixes upon them actual fraud; but merely that it does not affirmatively show them innocent of actual fraud. But innocence of actual fraud was properly to be presumed in their favor; and the trial judge ignored or rather reversed that presump-

tion under the influence of a construction of a statute which, as we have argued, was unwarranted.

This court, therefore, can and should approach the consideration of the testimony unhampered by a presumption that the trial judge's inferences therefrom must have been correct; approach it, that is, as upon a trial *de novo* of the question of fact at issue,—actual fraud on the part of the appellants, or their innocence thereof,—and with the presumption in favor of their innocence.

3.

The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence.

This point is urged in support of the eighth, eleventh, fourteenth and fifteenth assignments of error; the questions of actuality and sufficiency of consideration being discussed hereunder, as intimately connected with that of fraud.

The recovery of the appellee's judgment, the executions thereon, the making and delivery and subsequent recording of the deed of transfer (plaintiff's Exhibit B and defendants' Exhibit 1—Record, pp. 98-100, 112-15), the resale by Cummings to Thompson of the saloon personalty and business, are all admitted facts. The sole material issues are as to the consideration for and the good faith of the transfer to Cummings.

(1) Thompson constructively testified (the plain-

tiff's admission under the statute, in order to defeat Cummings's application for a continuance on account of Thompson's absence, that if present he would testify as set forth in the affidavit for continuance, being equivalent to such testimony) that he sold the property to Cummings for $1,500, of which $500 was paid in cash and $1,000 by the cancellation of a debt of that amount theretofore owing by Thompson to him; and that the sale was subject to the outstanding debts of the saloon business. (Record, p. 28.)

Cummings in person testified, at the trial, that he paid for the whole property transferred to him $1,500. "I paid $500 in cash and I gave a note I had of him for a thousand dollars that he owed me. * * * He owed it to me for the business he bought me out of, in Katalla—half interest of the business I owned in Katalla." In 1907 "I sold him the half interest I owned, stock and fixtures, for $2,000"—a note for half, and cash half. (Record, pp. 42-3.)

CROSS EXAMINATION: There wasn't anybody present when I paid Thompson the $500; we went up to Thompson's room in the hotel—in the Seattle Hotel (at Valdez). I paid him in currency, paper money, $500, and gave him the note at the same time. That note was dated at Katalla; I never was in partnership with him there; it was in the summer of 1907 that I sold out to him in Katalla—some time the last of August. Then I went below, went to Seattle; I think I remained out until the spring of 1909. The note was payable one year after date, without interest. There never had been any payments made on it; it

was a little more than a year past due when he paid me. He wrote me if I didn't need the money he would like to get more time on it, when it was due. I never knew anything about his money matters. (Record, pp. 49-50.)

This is all of the evidence touching the payment of the consideration. There was no attempt at contradiction. But the appellee argues against this evidence on the ground of improbability. Such a criticism has no substantial basis. Miners and saloon men in Alaska do comparatively little business by means of bank checks; it is their habit to carry considerable sums of money about the person; Cummings was on a prolonged stay at Valdez, in attendance on the court as a grand-juryman (Record, p. 47), and it was not unnatural that he should have come from Seward, where he then lived, well provided with ready money. He testified (cross examination—Record, p. 68): "For quite a few years I have been in the habit when I went away to have a little money with me and pack it with me; I drew the money out of the bank (at Seward). I did not know what I might run up against there (at Valdez). You never can tell, away from home."

The methods of such men, in a frontier country, are not to be tested according to the more guarded style of business transactions in thickly settled communities of high commercial development. The plaintiff could readily have called witnesses and compelled the production of books from the bank at Seward, where the trial was had, in an effort to prove the falsity of Cummings's statement that on going to Valdez he had

drawn the money from the bank. The plaintiff did not venture to make this attempt; and it is respectfully submitted that the evidence produced must stand as sufficiently establishing the payment of the consideration, as claimed by the defense.

The testimony on this point is attacked as varying from the statement of consideration ($1.) in the deed, and from the averment in Thompson's answer of payment in "lawful money of the United States of America." Childish quibbles! The expression of a nominal consideration in a deed is of daily occurrence, and the real consideration is always open to proof. And the averment of the form of payment in Thompson's answer was couched by the pleader in stereotyped phrase, and could not conclude his co-defendant from testifying to the actual fact.

Stress is laid on the fact that the cancelled note for $1,000 was not produced by the defense. But it was presumably in the hands of Thompson (if not torn up by him when it was surrendered, as is most probable), who was not present at the trial, but lay disabled by an accident at Susitna, 175 miles distant. The plaintiff had successfully objected to a postponement of the trial until he could be present, and it does not lie with him now to insinuate falsity in the evidence of consideration because Thompson did not appear and produce his cancelled note.

As to the *adequacy* of the consideration, the trial judge in his opinion says (Record, p. 122), "that the property other than the mining claim was probably worth about $1,500; the mining claim had a purely

speculative value impossible to fix." Considering that Cummings in his purchase assumed a half share of saloon indebtedness amounting to about $1,800, it must be concluded that Thompson received a full equivalent for his mining claim as well as everything else. What is more, the court's findings of fact (Record, pp. 140-43) embrace no finding that there was no valuable consideration. The statement to that effect found in conclusion of law No. III (p. 144) must be disregarded, as absence of consideration is matter of fact to be found, not of law to be applied.

(2) As to the *bona fides*: The trial judge's opinion mentions (Record, pp. 129-30) a number of circumstances of the transaction between the appellants as amounting to "badges of fraud." Little comment upon these circumstances will be required to show their entire consistency with the good faith of the parties, and especially the vendee; and it should be borne in mind that the trial judge, misplacing the burden of proof as shown above, did not declare that these circumstances made out an affirmative showing of fraud, but merely that they showed the defendants unable to discharge the burden thus wrongly laid upon them.

"Close and intimate relations existing between the parties to the transaction claimed to be fraudulent."

The only showing of any such relations is found in Cummings's testimony (p. 49) that he never was in partnership wth Thompson at Katalla, but away back in 1903-4 had been in partnership with him on Kayak Island. Truly a weighty circumstance to cast suspicion on a deal between them in 1909!

"Suit pending against the grantor approximately for an amount equal to the value of the property."

Cummings's knowledge of that suit is not a badge of fraud, but rather the contrary; for Thompson believed, and so assured him, that he was not liable and the suit could not prevail (pp. 29, 67). Moreover, Cummings was himself a creditor of Thompson for $1,000, and could exercise his undoubted right of preference by taking his property for the debt even though he knew of the suit and anticipated a possible result adverse to Thompson, so long as the cancellation of the debt and the money paid amounted to an adequate consideration for the property taken over.

"Insolvency of the grantor—the value of all his property was at the time of transfer about $1,500; his debts known to grantee other than that involved in the pending suit amounted to $2,800."

But of this $2,800, $1,000 was owing to Cummings and was cancelled as part of the consideration for the sale; and the remaining $1,800 was saloon indebtedness, which Cummings assumed as part of the transaction (pp. 53, 77).

"Unusual delay in recording conveyance."

It appears that the recorder at Susitna, who drew and acknowledged the deed while at Valdez, shortly afterwards went thence to the states, and did not return to his post at Susitna until the following February (pp. 36-7); that Cummings, although he knew of his passing through Seward when returning from the states, did not happen to think of handing him the deed for record (pp. 78-9); that the winter mail service

to Susitna, an interior point above the head of Cook Inlet, was very infrequent and uncertain; and that in the course of the spring Cummings sent the deed for record from Knik to Susitna by one Beede. It is submitted that Cummings's carelessness and dilatoriness about recording the deed, while reflecting on his business methods, argue for rather than against his good faith and innocence of purpose (p. 65). Had there been combination with Thompson in fraud of his creditors, the deed would surely have been dispatched for record to Susitna immediately upon its execution, months before the pending suit could come to trial.

"A sale of all his property of mixed character to one grantee."

Sufficient and proper motive for such a general disposal of his Alaskan interests is shown by Thompson's statement to Cummings (p. 66) that he was not coming back if he could get into business down there (in the states) in a saloon (pp. 66, 74); coupled with the fact that his wife came on from Susitna and went outside at about the same time (p. 66). Besides, the vendor's sale of all his property argues no fraudulent intent on the part of the vendee, who is not shown to have had knowledge or notice that Thompson had no other property.

"That at the time of purchase the property was unknown to the grantee." And "that it was bought without an attempt to examine, or request by the grantee for time to examine."

To one familiar with the "magnificent distances" of Alaska, and the means of traversing them, these "badges

of fraud" seem far-fetched. A creditor of Thompson for $1,000 more than a year overdue, while tied up on grand jury service in court at Valdez (p. 79), finds that he can realize his debt by purchasing, for its cancellation and $500 cash, Thompson's Alaska holdings, comprising a saloon interest and a roadhouse in dead-and-alive Susitna (p. 52) and a hitherto unprofitable mining claim far beyond. It must be now or never, as Thompson is bound for the states to seek business opportunities there (pp. 45, 47, 66, 74). Instead of demanding time for examination of the properties, throwing up his grand jury job, and voyaging some 400 miles to Susitna, thence "mushing" on foot 100 miles farther to the mining claim, already covered with snow, in the edge of winter, he makes such inquiries of others as he can (pp. 51, 53, 68), trusts the word of Thompson, whom he has known for some years and has never known to "beat anybody" (p. 73), and closes the deal. *Guilty!*

"That grantee did not take possession," etc. And "that the grantee did not exhibit ordinary interest in or attention to it after the transfer."

What has been last said is also sufficient explanation of Cummings's not going to Susitna that winter, but leaving Price, the saloon partner, in possession for him. Before spring Thompson returned, and repurchased the saloon business, becoming lessee of the saloon building; and for the following season Cummings leased the mining claim on royalty (pp. 53-4, 60), hence he had no occasion to visit it. Thompson's vaguely proved protests against intrusion upon the attendant water-

right, made the following summer, are shown not to have been known to or authorized by Cummings (pp. 62, 75-6), and cannot affect him.

"That the instrument of transfer was left with or delivered to the grantor."

There is not a scintilla of evidence in the record to sustain this statement, or to lead one to suspect such a fact.

"That it was hurriedly recorded by the grantor at an unusual time, to-wit, 8:30 Sunday night."

The deed was sent for record by the grantee through Beede as his messenger (pp. 62, 79), who on arriving at Susitna on a Sunday evening, happening to meet the grantor, sent it to the record office by his hand (p. 28). A mail arriving several hours later on the same evening brought the transcript of the plaintiff's judgment at law, which was recorded shortly before midnight. If the time was unusual for the deed, *a fortiori* for the judgment. To find anything irregular about this recording is to impute perjury as well as official dereliction to the disinterested witness Farris, the recorder.

"That no vouchers or documentary evidence of any kind to support the transaction are introduced or offered."

But, as we have shown, it was up to the plaintiff to overthrow the transaction, not to the defendants to "support" it. Besides, Alaskan miners cannot be expected to preserve either letters or cancelled notes for two years and more, especially when conscious of no wrongdong.

"That so few of the acts of the parties to the trans-

action were done in the ordinary manner."

Too vague to be susceptible of contradiction; and too hypercritical of the careless fashion of many "deals" on the frontier.

"That without an examination of the property the grantee sold back to the grantor the saloon for $400, which grantor was immediately able to mortgage for $1,100."

The mortgage to one Murphy in July 1910 is so long subsequent to and entirely distinct from the sale to Cummings here assailed, that no inference whatever can properly be drawn from the one touching the good faith of the other; nor can fraud be imputed to the debtor's repurchase in February, in his own name, of a part of the property sold by him in the preceding October. But lest the amounts here mentioned in comparison should give an unfavorable impression, it is as well to point out that the $400 which Thompson paid Cummings on the repurchase is precisely the net value of the half interest in the saloon stock and business, in excess of half the current indebtedness, as of the time of the original sale (pp. 52-3, 55, 67), so that the repurchase simply amounted to a cancellation *pro tanto* of the original sale as of its date, thus obviating all occasion for an accounting as to the business during the interval; and that the half interest thus repurchased, gross value $1,300, might not improbably be mortgageable the following July for $1,100 (the amount required to pay the annual liquor and tobacco licenses, due in July), notwithstanding teh existence of the current business

indebtedness—that not being a specific lien on the stock.

The law of fraudulent conveyances is so familiar that any discussion of it would be superfluous. Each case must stand on its own facts, and it will be enough to cite, without comment, a few of the decisions deemed most applicable to the facts disclosed by this record. The testimony of Cummings, under prolonged and rigid cross examination, while it shows him to have been a man of little education, unfamiliar with businesslike methods of dealing, bears throughout the stamp of truthfulness. His delay in forwarding his deed for record shows that, far from combining with Thompson to beat his creditors, he had no knowledge or suspicion of any fraudulent intent on Thompson's part. Thompson's innocence is equally evident, for had he planned to defraud his creditors he would not have returned to Alaska, repurchased the saloon stock, and resumed business; and had his mortgage to Murphy (which, indeed, as shown above, has nothing to do with this case) been made to evade payment of the plaintiff's judgment, it would not have been deferred until July 1910, long after the transcript of the judgment had reached Susitna. The transaction between the appellants stands, on the whole evidence, untainted by fraud of either party, as a purchase by Cummings made upon actual and adequate consideration, in the exercise of his lawful right to obtain satisfaction for his own claim, and without any reason to anticipate that Thompson would become subjected, by the success of the plaintiff's action at law, to any liability in addition to his current

business indebtedness, which Cummngs assumed. The purchase, therefore, cannot be successfuly assailed.

Rule v. Bolles, 27 Or. 368; 41 Pac. 691, 693.

Jones on Evidence (2nd Ed.), p. 233.

Wheaton v. Sexton's Lessee, 4 Wheat. (U. S.) 503; 4 L. Ed. 626, 627.

Johnson v. McGrew, 11 Ia. 151; 77 Am. Dec. 137.

Bamberger v. Schoolfield, 106 U. S. 149; 40 L. Ed. 374, 379-80.

Crawford v. Neal, 144 U. S. 596; 36 L. Ed. 522, 556-7.

Shelly v. Booth, 39 Am. Dec. 481.

Ruhl v. Phillips, 48 N. Y. 125; 8 Am. Rep. 522.

Jones v. Simpson, 116 U. S. 610; 29 L. Ed. 742, 744.

Prewit v. Wilson, 103 U. S. 24; 26 L. Ed. 363.

Parker v. Conner, 93 N. Y. 118.

Coolidge v. Heneky, 11 Or. 327; 8 Pac. 281, 282 *ad fin.*

Stewart v. English, 6 Ind. 176.

4.

Even if certain of the property conveyed was real estate, the plaintiff had not brought himself into privity therewith, and hence cannot maintain this suit.

This point is urged in support of the seventh [handwritten: sixth] and fourth assignments of error.

We are unable to see why the trial judge, while holding the roadhouse buildings to be personalty, held the saloon building to be real estate. All these buildings being in Susitna, a small unincorporated settlement on the public domain, are presumably mere squatters' improvements, ranking as personal estate. As to the mining clam, it is true that many authorities have pronounced possessory right under a mining location, while the claim remains unpatented, an interest in real estate; but the supreme court of Oregon, the state from which Alaska derives its legal system, holds the contrary.

Herron v. Eagle Mining Co., 61 Pac. 417.

See Phoenix M. & M. Co. v. Scott, 54 Pac. (Wash.) 777.

If the whole contents of the deed were personalty, then a seizure by execution levy was a prerequisite to this suit, as the trial judge has held. But even if the saloon building and the mining claim were properly classed as real estate, we respectfully submit that (notwithstanding the trial judge's destructive criticism, in his opinion, of the cases cited below) either the title must rest in the judgment debtor or the judgment at law must have been made a lien by levy, in order to support a suit to set aside a transfer as fraudulent toward creditors.

Wells v. Dalrymple, Fed. Cas. No. 17392.

In Re Estes, 3 Fed. 134.

Miller v. Sherry, 69 U. S. 237; 17 L. Ed. 287.

Smith v. Ingles, 2 Or. 43.

In this case, Thompson's deed of transfer to Cummings having been filed for record previously to the transcript of the plaintiff's judgment at law, the latter did not become a lien; and no levy was made. Hence the complaint failed to show either of the alternative prerequisites to equitable relief. The distinction pointed out by the trial judge between this case and *Arnett v. Coffey,* 27 Pac. (Col.) 614, is not real but merely apparent, and that case also is applicable.

5—9.

The court's first "conclusion of law" is a mere finding of fact and not of law, and is unwarranted by anything in the pleadings or proofs.

The court's second "conclusion of law" is also a mere finding of fact, and foreign to the issue.

The court's third "conclusion of law" is not sustained by anything in the facts found.

The court's fourth "conclusion of law" is a mere finding of fact, and as such is not sustained by anything in the pleadings or proofs.

The court's fifth conclusion of law is not sustained by the facts found, and the court erred in entering judgment accordingly.

These points (urged in support of assignments of error 9-13) may be argued together; they go not,

like those thus far presented, to the merits of the case, but to the formal sufficiency of the record to sustain the decree appealed from. Findings of fact must be such as to support the conclusions of law, and conclusions of law must be such as to justify the decree entered thereon. Neither the one nor the other are here sufficient to those ends. In each, matters of fact and matters of law are hopelessly intermingled. If Thompson's fraudulent intent declared in finding of fact No. VI is properly a matter of fact and not of law, then the same intent declared in conclusion of law No. III is not a matter of law, and has no place there. As pointed out above, there is no finding of fact of an absence of consideration. And nowhere, either in the findings or in the conclusions, is fraudulent intent on Cummings's part, or his knowledge of and participation in Thompson's fraudulent intent, found, either as matter of fact or as matter of law; nor is it found in the decree. This is fatal; and whatever may be this court's views as to the correctness of the decree as against Thompson, it should be reversed as to Cummings.

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